UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

MERCEDES FERNANDEZ, Complainant,	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 99B00033
VETERANS AFFAIRS MEDICAL CENTER, Respondent.	)	Judge Robert L. Barton, Jr.

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

(May 27, 1999)

I. INTRODUCTION

Respondent filed a Motion to Dismiss for lack of jurisdiction on May 10, 1999. This motion is being treated as a Motion to Dismiss for lack of subject matter jurisdiction as it centers around Respondent's allegations that it is immune from suit pursuant to the doctrine of federal sovereign immunity. Consequently, the main issue of this Order is whether the doctrine of sovereign immunity applies to Respondent, and, if so, whether the language of the Immigration Reform and Control Act of 1986 (IRCA) waives such immunity. For the reasons discussed below, I find Respondent is cloaked with sovereign immunity, and the language of the anti-discrimination provisions of the IRCA, 8 U.S.C. § 1324b, does not waive such immunity. Thus, I grant Respondent's Motion to Dismiss.

II. BACKGROUND AND PROCEDURAL HISTORY

Complainant filed a charge with the Office of Special Counsel for Immigration-Related Employment Discrimination (OSC) on November 1, 1998, alleging Respondent committed document abuse, pursuant to section 102 of the IRCA, 8 U.S.C. § 1324b(a)(6). See Compl. at 1. By a letter dated February 8, 1999, the OSC advised Complainant that it would not file a complaint before an Administrative Law Judge (ALJ) because it did not have jurisdiction over the charge since Respondent had not waived sovereign immunity. See OSC Letter. In the same letter, the OSC informed Complainant she could pursue a private cause of action with an ALJ in the Office of the Chief Administrative Hearing Officer (OCAHO).

Complainant subsequently filed a Complaint with the OCAHO on April 13, 1999, alleging Respondent committed document abuse by asking for more or different documents than required to show she was authorized to work in the United States. See Compl. at 5. On May 10, 1999, Respondent filed its Answer in which it denies that the OCAHO has jurisdiction to hear the Complaint and enumerates the following affirmative defenses**:** (1) the Complainant fails to state a claim upon which relief can be granted, (2) the OCAHO lacks jurisdiction over the subject matter of the claim because of sovereign immunity, and (3) the OCAHO lacks jurisdiction over the person of the federal defendant. See Answer at 3.

Along with its Answer, Respondent filed a Motion to Dismiss asserting that the OCAHO lacks jurisdiction to hear the claim because Respondent, the Veterans Affairs Medical Center of Tucson, as part of the Veterans Health Administration of the Department of Veterans Affairs, is a federal entity. As such, it is not amenable to suit because sovereign immunity has not been waived. See Mt. to Dismiss at 3-4. Pursuant to the OCAHO Rules of Practice, 28 C.F.R. § 68.11(b) (1998) and 28 C.F.R. § 68.8(b)(2) (1998),[1] Complainant had fifteen days to file a response to the motion. Complainant failed to file such response.

III. STANDARDS GOVERNING A MOTION TO DISMISS

As stated previously, Respondent has filed a Motion to Dismiss for lack of jurisdiction. The OCAHO Rules of Practice and Procedure do not specifically provide for a dismissal for lack of subject matter jurisdiction or personal jurisdiction. However, pursuant to the Rules of Practice and Procedure for Administrative Hearings, 64 Fed. Reg. 7066, 7073 (1999) (to be codified at 28 C.F.R. § 68.1), the Federal Rules of Civil Procedure may be used as a general guideline in any situation not provided for or controlled by the OCAHO Rules. See id.; United States v. Frank's Meat Co., 6 OCAHO 1094, 1095-96 (Ref. No. 513) (1993), 1993 WL 403793, at *1.

Federal Rule of Civil Procedure 12(b)(1) provides for dismissal of cases for lack of subject matter jurisdiction, while Federal Rule of Civil Procedure 12(b)(2) provides for dismissal of cases for lack of personal jurisdiction. Respondent does not distinguish whether its Motion to Dismiss is for lack of subject matter jurisdiction or lack of personal jurisdiction, but argues that the OCAHO lacks jurisdiction because Respondent is immune from being sued pursuant to the doctrine of federal sovereign immunity. See Mt. to Dismiss at 3-4.

Other courts have held "[t]he issue of whether the United States has waived its sovereign immunity is a question of subject matter jurisdiction." Rakozy v. Diversified Turnkey Constr. Co., 145 B.R. 661 (Bankr. D. Idaho 1992) (citing McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988)). But cf. Powelson v. United States, 150 F.3d 1103, 1104-05 (9th Cir. 1998) (discussing the

[1] Certain portions of Part 68 of Title 28 of the Code of Federal Regulations have been amended. References to those amended portions of Part 68 are to the interim rules published in the Federal Register at Vol. 64, no. 29, page 7066. References to those portions not affected by the interim rules are to the 1998 volume of the Code of Federal Regulations.

"confusing relationship between sovereign immunity and subject matter jurisdiction," and finding that "[s]overeign immunity is grounds for dismissal independent of subject matter jurisdiction"). In fact, cases involving the right to sue a sovereign are not usually viewed as personal jurisdiction matters but as subject matter jurisdiction matters. CHARLES ALAN WRIGHT AND ARTHUR P. MILLER, 5A FEDERAL PRACTICE & PROCEDURE, § 1351, at 241-42 (2d ed. 1990 & Supp. 1998). Thus, I will treat Respondent's motion as a Motion to Dismiss for lack of subject matter jurisdiction and will look to the guidance of the federal cases in applying Rule 12(b)(1) standards.

A 12(b)(1) motion may attack the allegations of the complaint or may be made as a "speaking motion" that attacks the existence of subject matter jurisdiction in fact. See Mayes v. Fujimoto, 181 F.R.D. 453, 455 (D. Haw. 1998), aff'd, No. 9816252, 1999 WL 197251 (9th Cir. March 19, 1999) (citing Thornhill Publ'g Co., Inc. v. General Tel. & Elecs. Corp., 594 F.2d 730, 733 (9th Cir. 1979)). Here, Respondent is not merely attacking the sufficiency of the pleadings. Instead, it alleges that regardless of the sufficiency of the pleadings, Respondent may not be sued. See Mt. to Dismiss at 3-4.

"Regardless of the character of the Rule 12(b)(1) motion, the complaint will be construed broadly and liberally...." WRIGHT & MILLER, supra, § 1350, at 218. However, where, as here, the motion is a "speaking motion," no presumptive truthfulness will attach to Complainant's allegations, and the trial court may evaluate for itself the existence of subject matter jurisdiction in fact. Mayes, 181 F.R.D. at 455. Additionally, Complainant bears the burden of asserting jurisdiction and the burden of showing a waiver of sovereign immunity. WRIGHT & MILLER, supra, § 1350, at 226; Baker v. United States, 817 F.2d 560, 562 (9th Cir. 1987).

IV. ANALYSIS

Complainant alleges Respondent committed document abuse pursuant to 8 U.S.C. § 1324b(a)(6), which provides the following:

> A person's or other entity's request, for purposes of satisfying the requirements of section 274A(b), for more or different documents than are required under such section or refusing to honor documents that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice if made for the purpose or with the intent of discriminating against an individual in violation of paragraph (1).

Id. Respondent argues that this tribunal lacks jurisdiction over these allegations because Respondent is a federal entity and may not be sued without its consent pursuant to the judicial doctrine of federal sovereign immunity. See Mt. to Dismiss at 3-4. Thus, it is necessary to determine whether this matter is a suit against the United States, a sovereign, and, if so, whether the sovereign has waived such immunity.

The United States, as a sovereign, may not be sued without its consent. See Lehman v. Nakshian, 453 U.S. 156, 160 (1981). An action that expends itself on the public treasury, interferes with public administration, or restrains the Government from acting or compels it to act is considered to be against the sovereign. See Dugan v. Rank, 372 U.S. 609, 620 (1963). Complainant's allegation pertains only to document abuse, since she does not allege that she was knowingly and intentionally not hired or fired or that she was discriminated against on the basis of her national origin or citizenship status. See Compl. at 2-4. Thus, if I determined that Respondent violated 8 U.S.C. § 1324b(a)(6), the relief granted to Complainant, such as a cease and desist order, would restrain the Government from acting. This is because Respondent, as part of the Veterans Health Administration of the Department of Veterans Affairs, is a federal agency. See Helfgott v. United States, 891 F. Supp. 327, 329-30 (S.D. Miss. 1994).

In fact, several courts have dismissed cases against federal entities where plaintiffs sought relief other than money damages on the premise that the doctrine of sovereign immunity applies to federal agencies and to federal employees acting within their official capacities. See Hodge v. Dalton, 107 F.3d 705, 706 (9th Cir. 1997) (affirming a district court's dismissal for lack of subject matter jurisdiction on sovereign immunity grounds, without discussing the Dugan test, where a plaintiff sought declaratory and mandamus relief from the Secretary of the Navy in his official capacity); Bennett v. United States Navy, No. CV 96-1550, 1997 WL 176728, at *1 (E.D.N.Y. April 2, 1997) (unpublished) (finding the doctrine of sovereign immunity barred an action where a plaintiff sought injunctive relief as well as money damages from the United States Navy). Here, Respondent is a federal agency and, as such, this is a suit against the United States, a sovereign. Consequently, sovereign immunity applies, unless Respondent has consented to waive its immunity. See Hensel v. Office of the Chief Admin. Hearing Officer, 38 F.3d 505, 509-10 (10th Cir. 1994).

Consent is found in the language of a statute, and any waiver of immunity must be clear, unambiguous, and "unequivocally expressed." See Lehman, 453 U.S. at 160-61; Kasathsko v. IRS, 6 OCAHO 175, 181 (Ref. No. 840) (1996), 1996 WL 281945, at *4-5. Thus, it is necessary to determine whether the United States has waived its immunity with respect to suits brought under the anti-discrimination provisions of 8 U.S.C. § 1324b. In a similar case, where a petitioner filed a discrimination claim pursuant to 8 U.S.C. § 1324b against the Oklahoma City Veterans Affairs Medical Center, the Tenth Circuit held that the petitioner failed to demonstrate that the IRCA "contain[ed] explicit and unambiguous language that waives the immunity of the United States." Hensel, 38 F.3d at 509. I have also previously held that the IRCA contains no express waiver of sovereign immunity. See Kasathsko, 6 OCAHO 176, 183.

Here, as in Hensel and Kasathsko, Complainant has failed to demonstrate that the IRCA language contains unequivocal language waiving immunity of the United States. In fact, Complainant has not filed any response to Respondent's Motion to Dismiss nor pleaded waiver of sovereign immunity.

V. CONCLUSION

The United States, as sovereign, may not be sued without its consent. A suit against Respondent, the Veterans Affairs Medical Center, is a suit against the sovereign and therefore, immunity applies. Further, Complainant has failed to demonstrate that the IRCA contains a waiver of sovereign immunity. Thus, Respondent's Motion to Dismiss is granted.

ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE

NOTICE CONCERNING APPEAL

As provided by statute, not later than 60 days after entry of a final order, a person aggrieved by such order may seek a review of the order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business. See 8 U.S.C. § 1324b(i); Rules of Practice and Procedure for Administrative Hearings, 64 Fed. Reg. 7066, 7083 (1999) (to be codified at 28 C.F.R. § 68.57).

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of May 1999, I have served the foregoing Order Granting Respondent's Motion to Dismiss on the following persons at the addresses shown, by first class mail, unless otherwise noted:

Mercedes Fernandez
4700 N. Kolb Road #12-112
Tucson, AZ 85750
(Complainant)
(First Class and Certified Mail)

Gregory G. Ferris
VA Regional Counsel, Region 19
Veterans Affairs Medical Center
3225 N. Central Ave., Suite 305
Phoenix, AZ 85012
(Counsel for Respondent)

John D. Trasvina
Special Counsel for Immigration-Related
Unfair Employment Practices
P.O. Box 27728
Washington, D.C. 20038-7728

Office of the Chief Administrative Hearing Officer
Skyline Tower Building
5107 Leesburg Pike, Suite 2519
Falls Church, VA 22041
(hand delivered)

_____

Linda Hudecz
Paralegal Specialist to Robert L. Barton, Jr.
Administrative Law Judge
Office of the Chief Administrative Hearing Officer
5107 Leesburg Pike, Suite 1905
Falls Church, VA 22041
Telephone No.: (703) 305-1739
FAX NO.: (703) 305-1515